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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 775

BRIER CREEK HUNTING AND FISHING CLUB, INCORPORATED,

Petitioner,

vs.

SCREVEN COUNTY, ET AL., INDIVIDUALLY AND AS BOARD OF COUNTY COMMISSIONERS OF SCREVEN COUNTY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

BENJAMIN E. PIERCE,
W. INMAN CURRY,
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SUPREME COURT OF THE UNITED STATES

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No. 775

BRIER CREEK HUNTING & FISHING CLUB, INC., *Petitioner,*

vs.

SCREVEN COUNTY, ET AL., INDIVIDUALLY, AND AS BOARD OF COUNTY COMMISSIONERS OF SCREVEN COUNTY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Brier Creek Hunting and Fishing Club, Inc., brings this its petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit rendered on the 27th day of February, 1953, reversing a final decree of the District Court of the United States for the Southern District of Georgia, Augusta Division, Honorable Frank M. Scarlett, Judge, granting a permanent injunction after hearing (R. 14).

A decision of the United States Court of Appeals for the Fifth Circuit, rendered on the 27th day of February, 1953,

reversing a final decree of the District Court of the United States for the Southern District of Georgia, Augusta Division, and overruling a motion for rehearing on the 30th day of March, 1953.

Jurisdiction

The jurisdiction to review the decision below by certiorari is based upon 28 U. S C. A., Section 1254-1.

Decision Below

The decision below, including a certified copy of the entire record in the lower court, and the motion for rehearing with the order overruling the same, is hereto attached and marked Exhibit "A" reported in Federal Reporter (2d) Series, April 20, 1953, page 369, and made a part of this petition.

Summary Statement of the Case

Petitioner is a corporation under the laws of Georgia, with its principal office in Richmond County, Georgia; Screven County is one of the sub-divisions of the State of Georgia; W. H. Lariscy, J. W. Hollingsworth, H. W. Zitterouer, R. E. Oliver, Jr., and U. A. Zeagler, are all citizens and residents of Screven County, Georgia, within the jurisdiction of this Court, and constitute the Board of Commissioners of Roads and Revenues of Screven County; that the amount involved is in excess of Three Thousand ($3,000.00) Dollars; that petitioner is the owner of a large tract of land in Screven County, Georgia, containing three thousand (3,000) acres, and having a value of Twenty-Five Thousand ($25,000.00) Dollars; that the entire tract of land owned by petitioner is enclosed by fences and gates, and has been so enclosed for more than twenty-five (25) years, and was so enclosed when the property was purchased by petitioner; that there is no public road in or upon the land

of petitioner, and particularly is there no public road leading from the entrance of petitioner's property to the lands of the confluence of Brier Creek and the Savannah River; that defendants are about to enter upon petitioner's property and to appropriate petitioner's property to the use of the general public. (Findings of Fact by District Court.) (R. Ex. "A", 1 & 2).

Questions Presented Are of Public Interest

The questions presented in this petition for certiorari are of general public interest, since they involve the right of every person who might claim the protection of the guarantees of the Fourteenth Amendment of the Constitution of the United States, which prohibits a State from taking private property for public use by an arm of the State without due process of law, and to have such rights determined by a Federal Court in pursuance of its original jurisdiction as defined by Section 28-1331 of U. S. C. A., where the amount involved in a civil case is in excess of $3,000.00 exclusive of interest and costs, also involves the rule as to whether or not the Court of Appeals can disregard the findings of a district court as to jurisdiction, when no evidence was designated as a part of the record on appeal to the Court of Appeals.

Petitioner relied upon the Fourteenth Amendment of the Constitution of the United States, which prohibits the taking of private property for public purposes without due process of law by an arm of the State.

It also relies upon 28 U. S. C. A. 1331, as to the original jurisdiction of the Federal Court.

Reasons Relied upon for the Allowance of a Writ of Certiorari

(1) Because appellants did not specify as a part of the record in the Court of Appeals any evidence introduced in the District Court, and therefore it was the duty of the Court of Appeals to give effect to the findings of the District Court.

(2) Because the decision below is in direct conflict with U. S. C. A., Section 28-1331, which defines the original jurisdiction of Federal Courts, since the relief claimed was a right guaranteed by the Fourteenth Amendment of the Constitution of the United States, which prohibits the taking of property for public purposes by State officers without due process of law.

(3) Because such question was squarely presented in a sworn petition, the facts of which were found to be true by the lower court. (R. Ex. "A", 9-6.)

(4) Because the suit was against Screven County, one of the sub-divisions of the State of Georgia, and not against individuals, as the Court of Appeals, in substance, held.

The decision of the Court of Appeals is in direct conflict with the following Court of Appeals decisions:

Leimer State Mutual Life Assurance Co., of Worcester, Mass., 108 Fed. (2d) 302 (7); and

Union Planters National Bank v. *Henslee*, 166 Fed. (2d) 993 (1).

The decision of the Court of Appeals was also in direct conflict with the following decisions where a consideration of the evidence is necessary to determine the question of jurisdiction and no evidence is designated as part of the record in the Court of Appeals, that court must assume

that the lower court had sufficient facts before it to sustain the order entered.

Bank of Eureka v. *Parthington*, 91 Fed. at page 590;
U. S. v. *Arkansas Power & Light Co.*, 165 Fed. (2d) 354 (5);
Montgomery Ward & Co., Inc., v. *Langer*, 168 Fed. (2d) 182;
Asher v. *Ruppa*, 173 Fed. (2d) 10 (5);
Merkel v. *Carter Carburetor Corp.*, 175 Fed. (2d) 323 (1);
Griffiths Dairy, Inc., v. *Squire*, 138 Fed. 758 (2);
Federal Rules of Civil Procedure, 52- (a);
Zander v. *Lutheran Brotherhood of Minneapolis, Minn.*, 137 Fed. (2d) 17 (7).

Because the petition in the lower court stated a claim arising under the Constitution of the United States under proper rules of pleading and practice, and it was error in the Court of Appeals to rule to the contrary, and such ruling was in direct conflict with the principles ruled in the following cases:

We insist that the ruling of the Court of Appeals is in direct conflict with this pronouncement.

In:

Montgomery Ward & Co., Inc. v. *Langer*, 168 Fed. (2d) 182,

it was held:

> "(3). On appeal from judgment dismissing complaint, the reviewing court was required to view case pleaded in aspect most favorable to plaintiff, and most unfavorable to the defendant."

That court further said:

> "(6). A suit cannot properly be dismissed as involving a controversy within a court's jurisdiction,

> unless facts of the record create a legal certainty of the conclusion."

From this ruling, it is clearly demonstrated that the record in this case did not authorize a dismissal for lack of a "Federal question".

In:

Merkle v. *Carter Carburetor Co.*, 175 Fed. (2d) 323 (1), it was ruled:

> "(1). On appeal from judgment entered by the court on defendant's motion to dismiss in the course of plaintiff's evidence, the Court of Appeals must view the evidence in light most favorable to plaintiffs, and give plaintiffs benefit of all inference that may be reasonably drawn from the evidence presented. * * *"

We note that the decision of the lower court was directly in point with the case of *Eureka* v. *Parthington, supra.* Since we have already quoted from this decision, we will not quote further therefrom.

Barron & Holtzoff, Sec. 1131, page 831;
Osborne v. *Bank of U. S.*, 9 Wheaton at 18;
Cohen v. *Virginia*, 6 Wheaton 264;
Bell v. *Hood*, 327 U. S. 678;
Mosher v. *City of Phenix*, 287 U. S. 29;
Nashville v. *Taylor*, 86 Fed. 168; at p. 184;
Portland Light & Power Co. v. *City of Portland*, 181 Fed. 632;
City of Toledo Ry. & Light Co., 259 Fed. 450;
Booth v. *Lloyd*, 33 Fed. 593;
Ex Parte, Virginia, 100 U. S. 339.

Because the lower court states in its opinion on page 3 thereof that "the decisive issue is a factual one between the appellants and the appellee"; when there was no disputed issue of fact on the record, and the ruling of the

lower court was in direct conflict with the principle ruled in the case of *Noble* v. *Union River Logging Co.*, 143 U. S. 165.

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record below, and that the decision of said Court of Appeals be reversed, and petitioner prays for such other and further relief as may be just.

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BRIEF IN SUPPORT OF THE FOREGOING PETITION

We submit the following brief in support of the petition for certiorari.

The case was launched upon a claim arising under the Fourteenth Amendment of the Constitution of the United States. There were no objections to the manner in which such claim was asserted. The petition was short and to the point, and was sworn to, and no relief was granted until after full hearing (R., p. 6).

Congress has enacted by U. S. C. A. 28, Section 1331, as follows:

> "The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000.00, and arises under the constitution, laws or treaties of the United States."

We insist that this provision was scrupulously followed, and that the Court of Appeals of the Fifth Circuit erred in reversing the District Court's decision, with direction to dismiss for lack of a "Federal question". In doing so, we submit that that court ran counter to the principles ruled in the cases set out in this petition for certiorari.

Questions Presented Is of Public Importance

The question presented in this petition for writ of certiorari is of public importance. It involves the original jurisdiction of Federal Courts of the United States. The purport of the decision below, if followed, we insist would exclude from original jurisdiction of Federal Courts every case, unless "every part of which" is dependent upon the Constitution of the United States, or some law of Congress, or some Treaty, and since "there is scarcely any case, every part of which depends upon the Constitution, laws, or

treaties of the United States", (*Osborn* v. *Bank of U. S.*, 9 Wheaton, at page 819, 20. 6 L. Ed. 223).

The effect of the decisions wholly frustrates the intention of the Constitution of the United States which invested Congress with authority to create inferior courts and define their jurisdiction, as it has done by U. S. C. A. 28-1331, which provides:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. June 25, 1948, c. 646, 62 Stat. 930."

Under the ruling in:

Bell v. *Hood,* 327 U. S. 678, 90 L. Ed. at 942;

it has been held that:

> "The party who brings a suit is master to decide what law he will rely upon * * * and thus determine whether he will bring a 'suit arising under' the * * * (Constitution or laws of the United States) by his declaration or bill."

And since there is no question made in this case of the bona fides of the claim asserted, and no question that the claim was improperly pled nor that the amount involved was insufficient, or that the claim was frivolous or fraudulent, it seems to us there can be no question as to the jurisdiction of a Federal Court.

In:

Barron & Holtzoff, Section 1131, page 831, we find this language:

> "On appeal, the appellate court does not re-try the case. The findings of fact are presumptively correct,

> and will not be set aside unless clearly against the weight of the evidence or based upon an erroneous view of the law. Consequently, appellant, seeking to overthrow the findings, has the burden of presenting a proper record to the Court of Appeals showing that the evidence compelled a finding in his favor."

We respectfully insist that in the case before the Court, the Court of Appeals not only disregarded such principle, but disregarded the findings of the District Court as to the evidence before it without having such evidence before it.

In:

> *Leimer State Mutual Life Assurance Co. of Worcester, Mass.,* 108 Fed. (2d) 302 (7),

it was held:

> "Motion to dismiss complaint for failure to state claim upon which relief can be granted has the effect of admitting existence and validity of the claim as stated, and challenges the right of plaintiff to recover thereunder."

In:

> *Union Planters National Bank vs. Henslee,* 166 Fed. (2d) 993 (1),

the Court held:

> "Under defendant's motion to dismiss on ground that the complaint does not state a cause of action, all allegations of fact properly pleaded in the complaint and its amendments must be taken as true, and the motion must be denied unless it clearly appears that allegations of fact are insufficient to entitle plaintiff to recover."

It is submitted that the decision of the Court of Appeals is in direct conflict with the following decisions where no evidence is designated as a part of the record in the Court

of Appeals. It was the dutty of that court to give full credence to the finding of the court below.

In:

Bank of Eureka vs. Parrthington, 91 Fed., at page 590,

the Court held:

> "A decision of the quaestions thus attempted to be raised will require an examination of the evidence. The evidence is not in the record. The record contains neither a statement of the evidence nor an agreed statement of the case. See: Equity Rules 75 (b) and 77, 226 U. S. 672; 286 U. S. 570; (28 U. S. C. A., following Section 723 * * *). Not having the evidence before us, we indulge the presumption that it justified the order which the Distrrict Court made."

It was error in the Court of Appeals not to indulge the presumption that the evidence justified the order which the district court made.

In:

> *United States vs. Arkansas Power & Light Co.,* 165 Fed. (2d) 354 (5),

the Court said:

> "A complaint should not be dismissed on motion without a hearing on merits, unless it appears as a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim."

Then the Court wholly disregarded the case of:

> *Griffiths Dairy, Inc., vs. Squires,* 138 Fed. 758 (2),

where the Court held the claim that the trial court's finding was not supported by the evidence could not be supported on the appeal where evidence was omitted from the record. But it was presumed that findings were supported by evi-

dence. Federal Rules of Civil Procedure, (Rule 52 (a), 28 U. S. C. A., following Section 773 (c)).

Then again, in:

> *United States vs. Arkansas Power & Light Co.*, 165 Fed. (2d) 354 (5),

the Court held:

> "A complaint should not be dismissed on motion, without a hearing on merits, unless it appears to a certainty that plaintiff would be entitled to a state of facts which could be proved in support of his claim."

We insist that this provision of the law the lower court completely ignored in reversing the district court and directing that it be dismissed.

The next case is that of:

> *Union Planters Bank vs. Henslee*, 166 Fed. (2d) 933.

Then follow the cases of:

> *Montgomery Ward & Co. vs. Langer*, 168 Fed. (2d) 182; and *Merkel vs. Carter Carburetor Corp.*, 175 Fed. (2d) 323 (1).

We will not quote further from these cases.

Then follow the cases of:

> *Hillsborough Township vs. Cromwell*, 326 U. S. 620-30; *Hart vs. Keith Vaudeville Exchange*, 262 U. S. 271; and *Zander vs. Lutheran Brotherhood of Minneapolis, Minn.*, 137 Fed. (2d) 17 (7),

where the Court held:

> "Where questions on appeal turned upon sufficiency of evidence to support findings, burden rested upon appellant to bring before the appellate court a complete statement of evidence upon which findings were based, and nothing else entitled appellants to have review of questions whether findings were clearly erroneous."

By reference to the record, page 19, 20, the court will see that the only record designated by appellants was as follows:

> "1st. Plaintiff's complaint.
> 2nd. Defendant's motion to dismiss, including notice to plaintiff;
> 3rd. Order dated Ju'y 8, 1952, overruling defendant's motion to dismiss;
> 4th. Form introducing findings of fact and conclusions of law, dated July 8, 1952;
> 5th. Notice of appeal;
> 6th. Statement of points on which appellants intend to rely."

We respectfully insist that the petition in the lower court stated a claim arising under the Constitution of the United States under proper rules of pleading and practice, and it was error in the Court of Appeals to rule to the contrary.

This statement is clearly borne out by

Cohen v. *Virginia,* 6 Wheaton, 264,

where this Court held:

> "If it be to maintain that a case arising under the constitution or a law must be one in which a party comes into court to demand something conferred on him by the constitution or of the law, we think the construction too narrow. A case at law or equity consists of the right of one party as much as the other, and may truly be said to arise under the constitution, or a law of the United States, whenever its correct decision depends on the correct construction of either."

We respectfully submit that the construction of the Constitution was invoked, and that the lower court erred in disregarding the principles there laid down.

Then again, in the case of:

Mosher v. *City of Phenix,* 287 U. S. 29 (1),

the Supreme Court of the United States held:

> "Allegations of a bill of complaint in a suit brought by an abutting owner to restrain a city from appropriating his land for purposes of a street improvement, that the city, acting under color of state authority, has included as a part of the street complainant's property, of which there had been no dedication or deed to the city, and no proceeding for condemnation, thereby attempting to take such property without compensation and without process of law, in violation of complainant's rights under the Federal Constitution, present a substantial Federal question as to which the jurisdiction of a Federal court may be invoked."

It is respectfully submitted that the petitioner in this case certainly "invoked" a provision of the Constitution.

Then we insist that the decision of the lower court was directly in conflict with the case of:

Nashville, etc., v. *Taylor*, 86 Fed. 168,

where that Court held, at page 184:

> "State action, to which the prohibitions of the Fourteenth Amendment extend, is not limited to a legislative enactment as it comes from the hands of the Legislature, but extends to all instrumentalities and agencies officially employed in the execution of the law down to the point where the personal and propery rights of the citizens are touched."

This principle of law is fully supported by the cases of:

Portland Light & Power Co. v. *City of Portland*, 181 Fed. 632;

City of Toledo v. *Toledo Ry. & Light Co.*, 259 Fed. 450; (6);

Booth v. *Lloyd*, 33 Fed. 593; and

Ex Parte, Virginia, 100 U. S. 339.

We insist that the Court was in error in stating that

> "The decisive issue is a factual one between appellants and appellee" (R., pg. 3).

when, as a matter of fact, there were no disputed facts on the record, and since in every case there are certain facts necessarily involved, the decision of the lower court was directly contrary to the case of *Noble* v. *Union River Logging & Ry. Co.*, 143 U. S. 165.

Conclusion

A Constitution grants no rights, and to define such an instrument is not always easy.

In:

Cooley on Constitutional Limitations, p. 37,

we find this statement:

> "What is a Constitution, and what are its objects? It is easier to tell what it is not than what it is—it grants no rights to the people—it is designed for their protection in the enjoyment of the rights and powers they possessed before the Constitution was made."

The preamble to the Constitution of the United States declares:

> "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

The first provision thereof establishes the Congress; the second sets up the executive; and the third sets up the judicial.

It created but one court. All other courts and their jurisdiction were left to Congress. The judicial powers extend to all cases arising in law or equity. The jurisdictional powers extend to all cases arising in law and equity.

Then the Fourteenth Amendment followed in due course. Congress has prescribed that the district courts of the United States shall have original jurisdiction in all cases arising under the Constitution and laws passed by Congress (U. S. C. A., Title 28, Section 1331), where the amount involved is $3,000.00 exclusive of interest and costs.

The petition in the lower court alleged jurisdictional amount as set out herein. Petitioner was claiming a right guaranteed by the Fourteenth Amendment of the Constitution, and these facts the Court found to be true. So how it can be held that that Court should have dismissed the case for lack of a "Federal question", we are at a loss to comprehend.

In:

Hillsborough Township v. *Cromwell, supra,* in the 8th headnote, it is said:

> "While the charges of discrimination in the complaint were denied, the jurisdiction of the District Court is determined by the allegations of the bill."

Can it be contended with any degree of certainty that the bill in the instant case did not declare in unquestionable terms a claim arising under the Constitution? We think not.

Then, in:

Hart v. *Keith Vaudeville Exchange, supra,* it was said:

> "The jurisdiction of the district court is the only matter to be considered on this appeal. That is determined by the allegations of the bill; and usually, if the bill or declaration makes a claim that, if well founded,

is within the jurisdiction of the court, it is within that jurisdiction, whether well founded or not."

So we insist it was clearly error to reverse with direction to dismiss.

It is respectfully submitted that a writ of certiorari should be granted; that the decision of the Court of Appeals should be reversed, and the decree of the District Court should be reinstated.

Respectfully submitted,

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